United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

75-4220

United States Court of Appeals

FOR THE SECOND CIRCUIT

PITTSTON STEVEDORING CORPORATION and HOME INSURANCE COMPANY,

Petitioners,

against

FRANK SPATARO,

Respondent,

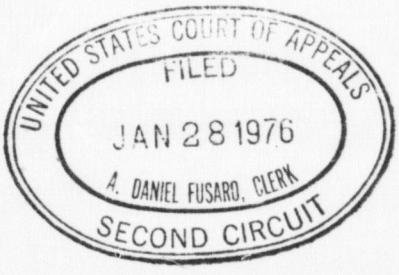
and

DIRECTOR, OFFICE OF WORKMEN'S COMPENSATION PROGRAMS UNITED STATES DEPARTMENT OF LABOR,

Respondent.

ON APPEAL FROM AN ORDER OF THE BENEFITS REVIEW BOARD U.S.D.L.

APPENDIX



JOSEPH F. MANES
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249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

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Decision and Order.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Washington, D.C. 20210

IN THE MATTER OF FRANK SPATARO, Claimant, VS. PITTSTON STEVEDORING CORPORATION, Employer, THE HOME INSURANCE COMPANY, Carrier.	CASE NO. 75-LHCA-36 [FORMERLY 2-28694]

Paul A. Gritz, Esquire
185 Montague Street
Brooklyn, New York 11201
For the Claimant

Joseph F. Manes, Esquire
Minore & Manes
11 Park Place
New York, New York 10007
For the Employer
and Carrier

Before: EDWIN S. BERNSTEIN
Administrative Law Judge

Pursuant to Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* ("the Act"), a hearing of the above matter was held before me in New York

City on December 23, 1974. Both parties were represented by counsel and were afforded a full opportunity to adduce evidence, to call, examine and cross-examine witnesses, and to submit briefs and proposed findings. Upon the entire record, my observations of the witnesses and their demeanor, and my study of the applicable law, I make the following findings of fact, conclusions of law, and order.

Findings of Fact

The parties stipulated and I find:

1. On June 28, 1973, while employed by Pittston Stevedoring Corporation as a hi-lo driver Claimant was injured. At the time of his injury, Claimant was attempting to open doors of a container which had come from a ship when he slipped and fractured his left tibia.

2. The accident occurred inside a container at the loading platform of the Marra Brothers Terminal in Brooklyn, New York. The loading platform was adjacent to navigable water.

3. As a hi-lo driver, Claimant would drive his vehicle into containers and transport palletized cargo from the containers to the loading platform. The containers would often arrive by ship and, after being unloaded, the cargo would be transported elsewhere by trucks and lighters.

4. Claimant's average weekly wages at the time of his injury were $306.19 and his maximum compensation rate was $167 per week. Claimant gave timely notice of claim and the claim was timely filed.

5. Claimant has been temporarily totally disabled since the accident and this disability continues. Claimant has

been paid $95 per week by the Employer and Carrier ("Respondents") which is the New York State rate of workmen's compensation.

I further find that although this cargo may have arrived at the terminal as early as 23 days before the accident, cargo such as the cargo in question is usually moved out of the terminal as quickly as possible and is not stored at the terminal except to await such further shipment.

The sole issue is whether or not this claim falls within the jurisdiction of the Act.

Conclusions of Law

This claim falls within the jurisdiction of the Act. The place in which the Claimant was injured constitutes navigable waters pursuant to Section 3(a) as an "other adjoining area customarily used by an Employer in loading, unloading, repairing or building a vessel."

I further find that Claimant is an employee under Section 2(3). This defines a covered employee as, "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker, including a ship repairman, shipbuilder, and ship-breaker. . . ." Claimant's work as a hi-lo driver here is maritime employment. This issue was decided by the Benefits Review Board in *Adkins* v. *I.T.O. Corporation,* BRB No. 74-123 (Nov. 29, 1974) and *Brown* v. *Maritime Terminals Inc.,* BRB Nos. 74-177 and 74-177A (Dec. 6, 1974). Other decisions in which hi-lo drivers were held to be within the Act's jurisdiction are *DiSomma* v. *John W. McGrath Corp.,* 74-LHCA-176 (Sept. 19, 1974) and *Mininni* v. *Pittston Stevedoring Corp.,* 74-LHCA-222 (Sept. 18, 1974).

In *DiSomma,* Judge Miller held that Claimant was an integral link in the chain of longshore operations and that the cargo which he was moving was part of a continuous flow of maritime commerce. In *Mininni,* Judge Geraghty concluded that, "Claimant's duties were an integral, necessary and essential step of a sequential loading operation, which commenced with the stuffing process and ended with container placement aboard ship. Although the work may be done by separate longshoring gangs, in integrated steps, the entire loading process, nevertheless, is a longshoring operation." I subscribe to these views.

The fact that the cargo on which Claimant was working arrived at the pier 23 days earlier does not defeat this claim. The cargo was on the pier awaiting further shipment and as such was in the course of maritime commerce. The Employer is not in the business of storing cargo. Its business is to load and unload cargo to and from ships. There was no intent to store the cargo on the pier but merely to keep the cargo on the pier available for loading onto a truck when the truck arrived and the cargo was ready for further movement. The movement of that cargo about the pier in preparation for its loading onto a truck is the maritime movement of cargo. In *Avvento* v. *Hellenic Lines, Ltd.,* BRB No. 74-153 (Nov. 12, 1974), the Benefits Review Board found that goods were in maritime commerce and claimant was in maritime employment even though the goods had been at rest on the pier for four days. To the same effect, in *Stockman* v. *John T. Clark & Son of Boston, Inc.,* 74 LHCA-219 (Nov. 25, 1974), Judge Oliver found jurisdiction under the Act although the goods that Claimant was working on had been unloaded from a vessel three days earlier. In *Lang* v. *Nacirema Operating Co., Inc.,* 74-LHCA-214 (Aug. 19, 1974) Judge Capps stated, "The fact that Claimant was loading a

container for eventual loading onto a vessel rather than actually loading a vessel at the time of his injury is not sufficient to remove him from the protection of the Act." In *Coppolino* v. *International Terminal Operating Co., Inc.*, 74-LHCA-50 (May 10, 1974), affirmed BRB No. 74-136 (Dec. 2, 1974), Judge Benn held that the argument that there was no vessel docked at the pier when the employee was injured was of little consequence. In *Bailey* v. *Nacireme Operating Co.*, 74-LHCA-117 (July 29, 1974) Judge Howder similarly disposed of an argument that the claim must fail because the cargo on which the employee was working when injured was not placed on board a ship until over two weeks later. In essence what must be looked at is not mere time but the reason that led to the cargo remaining on the pier. In the case at hand, as in those cited, the cargo was merely awaiting a further step in the overall process of maritime commerce and thus the claim is within the jurisdiction of the Act.

Claimant is therefore entitled to receive from the Employer and Carrier:

1. Compensation for temporary, total disability from June 28, 1973 onward until otherwise ordered at the rate of $167.00 per week, less any sum already paid.

2. Interest of six percent per annum from the date that each payment was due until paid.

3. Payment of all of Claimant's reasonable medical expenses resulting from the disabling injury, pursuant to Section 7 of the Act.

No award of Counsel fees can be included in the Order herein since Claimant's Counsel has not submitted any application and documentation in support of such award and the time for such submissions has expired.

Decision and Order.

ORDER

The Employer, Pittston Stevedoring Corporation and the Carrier, Home Insurance Company shall pay to Claimant, Frank Spataro:

1. Temporary, total disability compensation from June 28, 1973 to the date of this Order at the rate of $167.00 per week, less any sums paid, which compensation shall be payable forthwith in one lump sum.

2. Temporary, total disability compensation from the date of this Order continuing until otherwise ordered at the rate of $167.00 per week.

3. Interest of six percent per annum from the date that each payment was due until paid.

4. All of Claimant's reasonable medical expenses resulting from the disabling injury.

EDWIN S. BERNSTEIN
EDWIN S. BERNSTEIN
ADMINISTRATIVE LAW JUDGE

Dated: February 6, 1975
Washington, D. C.

Decision.

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
WASHINGTON, D.C. 20210

BRB Nos. 75-130
and 75-130A

FRANK SPATARO

Claimant-Petitioner
Cross-Respondent

v.

PITTSTON STEVEDORING CORPORATION

and

THE HOME INSURANCE COMPANY

Employer/Carrier
Respondents
Cross-Petitioners

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR

Party in Interest

Appeal from Decision and Order of Edwin S. Bernstein, Administrative Law Judge, United States Department of Labor.

Paul A. Gritz, Brooklyn, New York, for claimant.

Joseph F. Manes (Minore & Manes), for employer/carrier.

Jean S. Cooper (William J. Kilberg, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor), Washington, D. C.,

for Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: Washington, Chairperson, Hartman and Miller, Members.

Hartman, Member:

These are appeals by the employer and the carrier (hereinafter referred to as employer) and by the claimant from a Decision and Order (75-LHCA-36) of Administrative Law Judge Edwin S. Bernstein. The employer alleges that the Decision and Order is contrary to the evidence and the law. The claim was filed pursuant to the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (hereinafter referred to as the Act).

Claimant was employed by the Pittston Stevedoring Corporation as a longshoreman. On June 28, 1973, he sustained a fracture to his left tibia while attempting to open the doors of a container prior to unloading it. The injury occurred at a loading platform approximately 25 feet from navigable water.

The sole issue raised by the employer on appeal is whether or not this claim falls within the jurisdiction of the Act. The administrative law judge found the jurisdictional requirements of Sections 2(3), (4) and 3(a) of the Act clearly satisfied. 33 U.S.C. §§ 902(3), (4), and 903(a). Claimant had been working for this employer for more than three years as a longshoreman assisting in the process of loading, unloading and storage of containerized and palletized cargo. Claimant is an "employee" as defined by Section 2(3) of the Act. *Stockman* v. *Clark & Son of Boston, Inc.*, 2 BRBS ——, BRB No. 74-231 (July 30, 1975). Further, the employer is an "employer" as defined by Section 2(4) of the Act in that it employs a person, the claimant, in maritime employment. *Brown* v. *Maritime Terminals,*

Inc., 1 BRBS 212, BRB No. 74-177, 177A (Dec. 6, 1974). Finally, the situs requirement of Section 3(a) is satisfied as claimant was injured in a terminal area adjoining a navigable waterway. *Mildenberger* v. *Cargill, Inc.*, 2 BRBS 51, BRB No. 74-224 (July 3, 1975).

This Board has held that where compensation is due under the Act but not paid, the provisions of Section 14 are activated. 33 U.S.C. § 914; *McCabe* v. *Ball Builders*, 1 BRBS 290, BRB No. 74-181 (Jan. 31, 1975). Non-compliance with Section 14(d) mandates assessment of a ten percent penalty pursuant to Section 14(e). 33 U.S.C. § 914(d), (e); *McCabe, supra; Nulty* v. *Halter Marine Fabricators*, 1 BRBS 437, BRB No. 74-179 (May 2, 1975). Where, as here, payments were made on time but in an incorrect amount, the penalty will apply to the difference between the amount of the installment timely paid and the amount of compensation due on that date. *Caramagna* v. *Campbell Machine, Inc.*, 1 BRBS 446, BRB No. 75-115 (May 2, 1975).

As the sole issue raised by claimant-petitioner's appeal was the denial of a fee for work performed at the administrative law judge level and as the administrative law judge has awarded a fee to claimant's attorney which has been paid, claimant's appeal on that issue is moot.

The case is hereby remanded to the administrative law judge for a determination of whether the ten percent penalty is due. In all other respects, the Decision and Order of the administrative law judge is affirmed.

RALPH M. HARTMAN
Ralph M. Hartman, Member

We Concur:

RUTH V. WASHINGTON
Ruth V. Washington, Chairperson

JULIUS MILLER
Julius Miller, Member

Dated this 8th day of August 1975.

Transcript of Hearing.

U. S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

Case No. 75-LHCA-36
Formerly Case No. 2-28694

[SAME TITLE]

Courtroom Number 208,
The Tax Court,
Federal Building,
26 Federal Plaza,
New York, New York,
Monday, December 23, 1974.

The above-entitled matter came on for hearing before the Honorable EDWIN S. BERNSTEIN, Administrative Law Judge, at 9:25 o'clock, a.m.

APPEARANCES:

On behalf of the Claimant:

PAUL A. GRITZ, Esq., on behalf of the Employer/Carrier, Joseph F. Manes, Esq. (Minore & Manes).

PROCEEDINGS

Judge Bernstein: This is the formal hearing in Case Number 75-LHCA-36, Formerly Case Number 2-28694, a proceeding pursuant to the Longshoremen's and Harbor Workers' Compensation Act.

Colloquy.

The Claimant is Frank Spataro, the Employer is Pittston Stevedoring Corporation, the Carrier is the Home Insurance Company.

I am Edwin S. Bernstein, the presiding Administrative Law Judge.

Will counsel for Claimant please note his appearance?

Mr. Gritz: Paul A. Gritz, Esq., 185 Montague Street, Brooklyn, New York, 11201, appearing on behalf of the Claimant or Petitioner.

Judge Bernstein: Thank you, Mr. Gritz.

Will counsel for the Employer and Carrier, sometimes referred to as Respondent, please note his appearance?

Mr. Manes: Joseph F. Manes, 11 Park Place, New York City, New York.

Judge Bernstein: Thank you, Mr. Manes.

Counsel have stipulated to a number of facts.

Mr. Gritz, can you state the stipulated facts?

Mr. Gritz: The individual, Frank Spataro, was injured on June 28, 1973, while in the employ of Pittston Stevedores, Inc. Pittston Stevedores is an employer of longshoremen, am I correct, sir?

Mr. Manes: Yes.

Mr. Gritz: On the date of the accident, Mr. Spataro was working at the Marra Brothers Terminal. He was injured within the confines of the Marra Terminal, which is bordered on three sides by a fence and on the fourth side by water.

At the time of his accident, Mr. Spataro was earning $306.19 per week.

It is further stipulated that there has been timely notice and timely filing of a claim for Mr. Spataro.

We further stipulate there is continuing total disability from the date of the accident and up to and including today, and continuing.

We further stipulate that Mr. Spataro has been paid at the $95 rate since the date of the accident, which is the New York State Compensation rate.

Judge Bernstein: The terminal is in Brooklyn, is it?

Mr. Gritz: Yes, Marra Brothers Terminal is in Brooklyn.

Judge Bernstein: And I think you stipulated that he is temporarily-totally disabled?

Mr. Manes: Yes.

Judge Bernstein: And has been since the accident?

Mr. Gritz: Yes, Your Honor.

Judge Bernstein: And the question is whether this Claimant comes within the Federal Act, or within the provisions of the New York State compensation law, is that correct?

Mr. Manes: That is correct.

Mr. Gritz: I think we have a further stipulation, that as a result of the accident he incurred, I think it was a fracture of the tibia, was it not?

Mr. Manes: Left tibia, and the average weekly wage is $306.19, and the compensation rate would be $167.

Mr. Gritz: Would be $167, yes.

Judge Bernstein: And I think you also stipulated as to what his type of work was?

Mr. Manes: Hi-lo driver.

Judge Bernstein: And what he was doing when he was injured?

Mr. Gritz: We stipulated at the time of his accident, Mr. Spataro was a hi-lo driver, and at the time of his accident he was inside a container trying to take the bags away from the door so that he could open the door and drive his hi-lo inside of the container.

It was his job to take the cargo from the container and put it on the loading platform, whence it would be taken by another hi-lo into the warehouse—

Mr. Spataro: No, it would be put outside, in time the warehousemen would put it inside.

Judge Bernstein: As I understand it, the particular cargo was coffee, which had arrived, and was unloaded from a ship, which was in a container on a truck at the edge of the loading platform of the warehouse in question. The coffee would have eventually been taken by truck elsewhere, is that not correct?

Mr. Gritz: Truck or lighter. We are not sure. Depending on the evidence that Mr. Manes presents.

Judge Bernstein: It is your position that it is a lighter, and it is Mr. Manes' position it is a truck?

Mr. Manes: In fact, a truck, yes.

Mr. Gritz: May I say this, Your Honor, that in either instance, whether it be truck or lighter, that it would be taken to its final destination.

Judge Bernstein: I think you have also stipulated that the place in which he was injured was how far from the water?

Mr. Gritz: Twenty-five feet, approximately.

Judge Bernstein: That between where he was injured and the water, was a loading platform, is that not correct?

Mr. Manes: Yes.

Judge Bernstein: And you also have, Mr. Gritz has prepared a sketch which has been marked as Claimant's Exhibit 1, and since Mr. Manes has no objection to that sketch, I will admit that into evidence, is that correct, Mr. Manes?

Mr. Manes: Yes.

(The document referred to, Rough Sketch of Facility, was marked for identification, and received in evidence.)

Judge Bernstein: That sketch shows the location of the place in which Claimant was injured in this matter.

Are there any other facts that can be stipulated to?

Did we cover everything, Mr. Gritz?

Mr. Gritz: I think so.

Judge Bernstein: Mr. Manes, is there anything that you want to add?

Mr. Manes: I don't believe so.

Judge Bernstein: All right, I believe our only witness, Mr. Gritz, is the Claimant?

Mr. Gritz: Yes, it is, Your Honor.

Judge Bernstein: Mr. Spataro.

Whereupon, FRANK SPATARO was called as a witness and, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Gritz:

Q. Mr. Spataro, how old are you, sir? A. Sixty.

Q. And were you born in the United States? A. Yes.

Q. Can you read and write English, sir? A. Yes.

Q. Would you tell us how much schooling you have had, sir? A. I went through the 8th grade in junior high school.

Q. Now, you presently, do you belong to a union, sir? A. Yes.

Q. What union is that, sir? A. ILA, International Longshoremen's Association.

Q. Do you hold a card in the ILA? A. Yes, sir.

Q. May I see it, please, sir? A. (Handing card.)

Q. How long have you been a member of the International Longshoremen's Association, sir? A. Forty-two years.

Q. Forty-two years? A. Yes.

Q. You have been a longshoreman since 1932, am I right, sir? A. Yes.

Q. Was that the first job that you held, sir? A. Yes.

Q. First job you ever held? A. First steady job. I did a few jobs when I was a young fellow, like delivering orders, and stuff like that.

Q. Now, I notice on this card it says A-1. What does A-1 mean, sir? A. That is seniority.

Q. Meaning what, sir? A. That is a seniority, top seniority.

Q. A-1 means that you are the first man to be hired, is that right, sir? A. Yes.

Q. That is what the seniority card is, sir? A. Yes.

Q. You are down here as—what is your classification in the union, sir? In other words your job classification. A. Driver.

Q. You also have TLBR, is that terminal laborer? A. Terminal laborer.

Q. Terminal laborer and driver, sir? A. Yes.

Q. How many years have you worked for Pittston Stevedoring, sir? A. About three, three and a half years, or so.

Q. Before that, sir? A. I worked for Marra Brothers.

Q. Now, you were working for Pittston, and you say you were working fairly steady, right, sir? A. Yes.

Q. Does that mean that you were hired every day, sir? A. Yes.

Q. Is there a possibility that you were not hired, sir? A. Well, there is a possibility they could let me go.

Q. I see. Then you would have to shape up, sir? A. I would have to go back to the hiring hall.

Q. The ILA hiring hall? A. The Waterfront Commission.

Q. Right. Now, you do most of your work, am I right, at the Marra Brothers Terminal, sir? A. Yes.

Q. Where is that—on Smith Street in Brooklyn, sir? A. Yes.

Q. I show you a sketch which I have drawn with your help, and I ask you, is this a fair representation of what the pier looks like, sir? A. Yes.

Q. Taking into account that you and I are not artists, is that right, sir? A. Yes.

Q. And the pier is enclosed on three sides by a fence, and has an entrance, sir? A. Yes.

Q. Is there a guard at the entrance, sir? A. Yes.

Q. The only way to get in is with a card of some kind, sir? A. Not necessarily. The employees are allowed in, and naturally, truckdrivers are allowed in on the pier.

Q. Do they have to show their card, the truckdrivers, sir? A. They have to see the guard first to get their papers to go in.

Q. On June 28th, 1973, you were working as a driver, correct, sir? A. That is right.

Q. What was your job that day, sir? A. My job that day was to work the loading platform.

Q. How far is the loading platform from the water, sir? A. About 25 feet.

Q. Now, when you say work the loading platform, I want to remind you of this. We are not familiar when you say working, at least I am not, could you tell us exactly what your job was, sir? A. I operate a hi-lo, that is a lift machine.

Q. Is that gasoline or electric, sir? A. Gasoline driven, and I go into the containers and take out the palletized freight, and put it out on the platform.

Q. When you say palletized freight, what do you mean by that, sir? A. Stacked on pallets.

Q. Is that a wooden plank, sir? A. Planks nailed together, and the coffee is stacked on there.

Q. You go in with the hi-lo, into the container, put the forklift under it, sir? A. Yes.

Q. And take it out and put it on the loading platform, sir? A. Yes.

Q. What happens to the cargo when it is put on the loading platforms? A. Another machine takes it away.

Q. Where does it take it, sir? A. It takes it to the warehouse, I guess. Sometimes he just leaves it outside.

Q. Sometimes he just leaves it on the loading platform? A. On the outside.

Q. Where do you mean, sir? A. On the premises.

Q. Do you know what happens to the cargo after you take it from the container? I mean where does it go, sir? Let us assume that it is taken into a warehouse. Where does it go from the warehouse, sir? A. It—to its final destination.

Q. How does it get there, sir? A. It either goes by truck or lighter.

Q. Lighters come into the pier, do they, sir? A. Yes.

Q. When you say its final destination, is that outside of the pier, sir? A. Definitely.

Q. Then it is either by truck or by lighter, sir? A. That is right.

Q. Now, the cargo that the containers that you discharge, sir, and the container that you discharged in particular on June 28, 1973, where do those containers come from, sir? A. They come from the pier, the ship where the cargo was discharged.

Q. In other words, do they come from the Marra Brothers Terminal or— A. No, they come from another pier. Another ship, where it is discharged and put into the container, or put into the trailer and brought to us, where we discharge them.

Q. I see. Now, what is the purpose of that? In other words, am I right, I just want to recapitulate. This cargo of the containers comes off a vessel from another pier, sir? A. Yes.

Q. It is either put on a flatbed and discharged and brought to the Marra Terminal, sir? A. That is right.

Q. Where you take it out of the container, sir? A. Yes, sir.

Q. Then from—you either put it in the warehouse, or outside, and from there it is taken by truck or trailer—or lighter, to its final destination, sir? A. Yes, sir.

Q. What is the purpose of that, sir? Why don't they discharge the container at the pier that it is discharged at, sir? A. Well, they bring us the cargo from these ships in order to get room on the pier, because if they don't bring us the cargo they would be so jammed up they won't be able to operate the ships.

Q. Now, let me ask you, sir, you are a driver. Can they load or unload the ships without you, sir? A. Up to a certain extent.

Q. What do you mean up to a certain extent, sir? A. Well, if they are jammed up on the pier with cargo, then they have to knock the ship off. They have no place to put it. If they don't send it to us to clear their pier so that they can operate the ship—

Q. Now, another question I would like to ask you, sir, do you actually do any loading on your pier itself, sir? A. Loading?

Q. Yes, I mean loading. A. We load lighters.

Q. You do load lighters, sir? A. Yes, definitely.

Q. Suppose you did not take the cargo out of these containers as a driver, could they load the lighters, sir? A. Not necessarily, no, they couldn't, because it has to be taken out of the trailers in order to be put back on lighters.

Q. Then could they load these trucks if you did not take the cargo out of the containers, sir? A. No.

Q. Now, on June 28th, 1973, we are going to move rapidly, because we agreed on most everything, what time was it that you had your accident, sir? A. It must have been about, between 8:30 and nine o'clock.

Q. You were working on the loading platform at that time, sir? A. Yes, sir.

Q. Was it a flatbed with a container pulled up to the loading platform, sir? A. It isn't called a flatbed, because it is

called a bogey. The container sits right on the bogey with special brackets that it hooks onto, and it is rigged up so that the tractor can hook into it and take it wherever he wants to.

Q. Go ahead, sir. A. He in turn backs it up to the platform so that I can run into it and discharge it.

Mr. Gritz: Off the record.
Judge Bernstein: Off the record.
(Discussion off the record.)
Judge Bernstein: Back on the record.

By Mr. Gritz:

Q. Now, this container that you got hurt in, sir, that was hooked up to a bogey, right, sir? Do you know where that container came from? A. It came from one of the piers where it was discharged, where the cargo was discharged from a ship.

Q. Now, I want you to visualize this container that you got hurt in, it is backing up to the loading platform, is it, sir? A. That is right.

Q. Now, what happened? You tell me. Why did you have to go into the container, sir? A. You see, the driver backs this container on the bogey to the platform up to a certain distance, leaving enough room so that I can oper the doors.

Q. To get your hi-lo into— A. No, so that he can back all the way. Once you back into the platforms you cannot open the doors.

Q. Once you open the door—let us assume, what do you do with your machine, sir? A. I run in and out of the container, taking out the pallets with coffee, and put it on the platform.

Q. On this occasion, you went in and couldn't open the doors to the container, sir? A. Right.

Q. So you went inside the container? A. Yes. I climbed into the container, I pulled back the bags that were against the door. On the way down, because I am up on the bags, on the way down I slipped and my foot caught inside the pallet, and the container. And I fell out. My foot being wedged in there, when I twisted it, it splintered the bone of my foot.

Q. Which foot is that, sir? A. The left.

Q. Were you taken to the doctor? A. I was taken by ambulance to the hospital.

Q. What hospital is that, sir?

Judge Bernstein: Off the record.

(Discussion off the record.)

Judge Bernstein: On the record.

By Mr. Gritz:

Q. Since the date of your accident, have you returned to your job, sir? A. No, sir.

Q. Can you return to your job, sir? A. No, sir.

Q. Why is that, sir? A. Because I can hardly walk on the foot.

Mr. Gritz: I have no further questions.

Judge Bernstein: Thank you, Mr. Gritz.

Mr. Manes, do you have any questions?

Mr. Manes: Yes.

Cross Examination by Mr. Manes:

Q. Mr. Spataro, this bogey that came attached to the tractor, was that an open or closed affair? A. The bogey is a set of tandem wheels on a chassis that the container is landed on top of it, and when these containers come off the ships it is landed on this bogey—

Q. All right. It is a simple question, Mr. Spataro. Is

the bogey itself an open or enclosed structure? A. A bogey is an open structure.

Q. So the container is then placed upon the bogey? A. Yes.

Q. Is the container fully enclosed, that is, sides, top, bottom? A. Yes.

Q. So that when the truck is backing in with the container on it, you don't know, or you can't say what is in that container, is that correct? A. That is true.

Q. Now, is the height of the bogey contiguous with the height of the loading platform? On the same level? A. Well, just about.

Q. So that if the doors—does this container have doors in the rear? A. Yes.

Q. Did this one have doors in the rear? A. Yes.

Q. Now, if the doors were open, you would be able to drive your hi-lo directly into that container, pick up the pallets, and move them out? A. Yes, if the doors were open.

Q. In this case you say the doors were not open? A. Because the platform comes—

Q. No—

Judge Bernstein: Excuse me, he just wants you to say whether the doors were open or not.

The Witness: No.

By Mr. Manes:

Q. They were not open? A. They were not open.

Q. Were you seated on your hi-lo as the truck was backing in? A. No, I was standing on the platform.

Q Did you open the doors to the container? A. Yes.

Q. Was it at the point or time that you were opening the doors to the container, was the door adjacent to, flush to the loading platform? A. No, the platform is higher than the container.

Q. How much higher? A few inches? A. Enough that you can't open the doors unless you are away from the platform?

Q. How close was the container to the edge of the platform on this occasion? A. You mean while the doors were closed?

Q. Yes. A. I would say about six feet.

Q. Now, did you open the doors to the container? A. I did.

Q. What happened when you opened the doors? A. I opened the first door, it was clear. I opened it, and snapped it against the side of the container.

Q. Where were you standing when you were doing this at that time? A. On the ground.

Q. On the ground? A. On the ground.

Q. Below the platform? A. Below the platform.

Q. What happened after that? A. I couldn't open the second door because the coffee was against it, so I had to climb up to the container in order to pull back the bags of coffee that were against the door. On the way down I slipped.

Q. Did you pull back the bags of coffee? A. I did.

Q. Then did you open the door before you slipped? A. I couldn't open the door. I had to be down on the dock.

Q. You slipped while you were descending? A. While I was coming down.

Q. Now, the day before, that is June 27th, 1973, did you work for Pittston? A. Yes.

Q. Did you work at Smith Street? A. Yes.

Q. What were you doing that day? A. Working the loading platform?

Q. Were you working coffee that day? A. Yes, I was working coffee.

Q. Was the coffee in containers, or loosely on flatbed trucks? A. No. The day before we were working coffee mostly in truck-trailers.

Q. Now, was the coffee palletized, though? A. Yes.

Q. The day before, did you unload the trailers directly to the warehouse, or did you place them again on a platform only? A. My job is to place them on the platform.

Q. Does Pittston own Marra Brothers? A. No.

Q. Marra Brothers operates a warehouse there, do they not? A. Yes, Marra Brothers owns the property.

Q. The entire property? A. Yes.

Q. They use it as a warehouse?

Mr. Gritz: Objection, Your Honor.

How would the witness know that? If there are records that Mr. Manes has, we would be more than happy to concede to this.

How would he know who owns what? He knows that Marra Brothers owns the property, but obviously there is some kind of rental agreement.

Judge Bernstein: I think he already asked the question of ownership. He is now going to the question of use.

Let us see if he knows about this.

By Mr. Manes:

Q. Do you know if it is used as a warehouse—do you understand the question? A. No, I don't.

Q. Do you know whether or not that is used as a warehouse? Let me put it to you this way. You have been working at that Marra Brothers Terminal how many years? A. I have been working on that Marra Terminal since after World War II.

Q. You have unloaded trailers, and placed them, the contents, on the platform? A. Yes.

Q. You have seen people take the cargo you have deposited on the platform and put it in the warehouse, is

that right? A. I have seen them take the cargo away and place it on the ground.

Q. Now, adjacent to the platform, is there a door, or opening into the warehouse? A. No.

Q. There is not? A. No.

Q. Are there any doors in the warehouse? A. Around the front of the building.

Q. Show us on the sketch by marking it with the letter A, where are the doors on the warehouse? A. (Indicating.)

Judge Bernstein: Put an A there, Mr. Spataro.
The Witness: Yes.

By Mr. Manes:

Q. So items are taken from the loading platform by some mechanical means? A. Yes.

Q. What means are used? A. Another hi-lo.

Q. Who owns that hi-lo? A. Pittston.

Q. And it is put through door A into the warehouse? A. Yes.

Q. Were there any ships at the terminal pier that day? A. No.

Q. When do you recall was the last time a ship had been at that terminal? A. We have had plenty of lighters there.

Q. I am asking about a ship, or a vessel, as opposed to a lighter. A ship or a vessel. A. I couldn't say exactly.

Q. Is it a considerable period of time, a year or more? A. No, less than a year.

Q. Half a year? A. About.

Q. About half a year? A. Yes.

Q. You said you have unloaded lighters from that pier, is that right? A. We unloaded and loaded.

Q. When was the last time you loaded or unloaded a

lighter before June 28th, 1973, if you recall? A. Within a few days.

Q. Now, is there an entrance in this complex for trucks to come in and out? A. They all come in and out at this one gate.

Q. Would you mark that B point, please? A. (Indicating.)

Q. All the trucks are in and out. When the trucks go in and out, do they go to Door A, or do they go to the loading platform, or do they switch? A. The trucks come to the loading platform, because they can't go inside.

Q. Door A? A. It is a small door.

Q. All the loading and unloading is through this, at the platform itself? A. Right.

Q. Isn't it true that there must be a door from the interior of the warehouse to the platform? A. No.

Q. There is not? A. No.

Q. How do the goods get from, say Door A, to the platform, by hi-lo? A. Yes.

Judge Bernstein: Excuse me, Mr. Spataro. What is a lighter?

The Witness: A lighter is a barge. A closed barge.

Judge Bernstein: It is a vessel that travels along the water, is that correct?

The Witness: Yes, it is a vessel that is afloat.

Judge Bernstein: And cargo is carried on it?

The Witness: Yes.

Judge Bernstein: Thank you.

By Mr. Manes:

Q. Does cargo, such as coffee, have any identifying marks stamped on the bag? A. Yes.

Q. They do? A. Yes.

Q. What is the nature of those marks, do you know? A. I really couldn't answer that.

Q. Do you know the purpose of the marks? A. The purpose of the marks is different types of coffee, I imagine, or for different consignees.

Q. Different what? A. Different consignees.

Q. That means the people who are going to get the coffee ultimately, is that right? A. Yes.

Q. Do you recall on this day to whom the coffee was consigned? A. No.

Q. Do you know when this coffee had been offloaded from the vessel? A. No.

Q. Do you know how long there had been coffee in the warehouse prior to June 28th, 1973?

> Mr. Gritz: Objection, Your Honor. How would he know how long coffee has been in the warehouse? It is an impossibility, and it is absolutely irrelevant.
>
> Judge Bernstein: I am not sure that it is irrelevant. As far as how he knew it, let us ask him.

By Mr. Manes:

Q. Would you know? A. No.

Q. For instance, you loaded, or rather, unloaded coffee on June 27, the day before? A. That is right.

Q. It went into the warehouse? A. Right.

Q. Would you know when that coffee was moved? A. No, I wouldn't.

Q. It could stay there for months, could it not? A. I couldn't say, because we had been loading plenty of coffee out of the warehouse into the lighters. As a matter of fact, a majority of the coffee that goes out of that warehouse goes by lighter.

Q. You said you had worked on a lighter sometime before? A. Yes, we worked lighters, too.

Q. You couldn't recall, you said a few days before, what was loaded on the lighter? A. Coffee.

Q. Do you know the origin of that coffee? A. What do you mean by origin?

Q. Do you know if it was coffee that had been offloaded from a ship? A. It is all offloaded from ships.

Q. All coffee is offloaded from ships? A. That is right.

Q. And put in the warehouse? A. Right.

Mr. Manes: I have no other questions, Your Honor, thank you.

Judge Bernstein: Mr. Gritz?

Mr. Gritz: No questions, Your Honor.

Judge Bernstein: Okay, I have no questions.

Thank you, Mr. Spataro.

(Witness excused.)

Mr. Manes: Your Honor, may I have five minutes with my witnesses?

Judge Bernstein: Mr. Gritz, you have no further witnesses?

Mr. Gritz: No.

Judge Bernstein: All right, we will take a five minute recess.

(Short recess.)

Judge Bernstein: On the record.

Mr. Manes, how many witnesses do you plan on calling?

Mr. Manes: I plan only on one, but if there is any dispute about the documents which I have, I would have to use another witness to testify that these are documents in the regular course of business.

Judge Bernstein: All right, fine. Call your first witness.

Mr. Manes: Mr. Farley, please.

Judge Bernstein: Mr. Farley.

John M. Farley—Direct.

Whereupon, JOHN M. FARLEY was called as a witness and, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Manes:

Q. Would you give the reporter your full name and address? A. John Michael Farley, 383 Adams Avenue, West Hempstead, Long Island, New York.

Q. Mr. Farley, by whom are you employed? A. Pittston Warehouse.

Q. How long have you been so employed? A. Two and a half years.

Q. Were you so employed on June 28, 1973? A. Yes.

Q. Do you know the Claimant or the Petitioner in this case, Mr. Spataro? A. Yes, I do.

Q. How did you know him? A. He was a worker in our warehouse. He was employed by Pittston Warehouse.

Q. Do you recall that he had an accident in June of 1973? A. Yes, I do.

Q. Did you witness that accident? A. Yes, I did.

Q. Could you tell us what you saw on the date in question? A. Well, I was sitting at my desk up on the second floor in our office building, and the truck was backing in, and Frank was on the platform, standing on the platform. He did open the door of the truck that was backing in, I saw him fall between the truck and the platform, and I ran right downstairs, and I stopped the truck from backing in, otherwise the truck would have gone right over him.

Q. Are you familiar with the term container? A. Yes, I am.

Q. What does a container mean? A. A container is a truck loaded at the country of origin, and put on the ship, and brought into this country.

Q. Who was the trucker on the day in question? A. Intermodal.

Q. Does Intermodal—what is their relationship with Pittston? A. It is a subsidiary of Pittston, I believe it is.

Q. And they do trucking work at Pittston? A. Yes.

Q. I show you, Mr. Farley, a document called "Superintendent's Report of Accident." Can you identify your signature on that? A. Yes, I do. It is mine.

Mr. Gritz: This report was made by you?

The Witness: Yes.

Mr. Gritz: That is your signature over there?

The Witness: Yes.

Mr. Manes: Your Honor, I would like this marked as Respondent's Exhibit 1.

Judge Bernstein: Any objection to the admission of this, Mr. Gritz?

Mr. Gritz: Subject to cross examination.

Judge Bernstein: Admitted as Respondent's Exhibit 1.

(The document referred to, Superintendent's Report of Accident, dated June 28, 1973, was marked for identification as Respondent's Exhibit No. 1, and was received in evidence.)

By Mr. Manes:

Q. Mr. Farley, are you familiar with the term "palletized?" A. Yes.

Q. What does palletized mean? A. It is bags put on a pallet.

Q. And you are familiar with the term "containerized?" A. Right.

Q. And containerized is, I think, would you repeat that? A. Loading a container.

Q. Was this cargo palletized? A. Yes.

Q. Was it containerized? A. No, it was palletized on, I would say, Intermodal shore.

Q. Are you familiar with the method of unloading coffee bags from a vessel? A. No, not too much.

Q. Do coffee bags come in a container? A. They do.

Q. Is there a distinction between coffee bags in a container and this particular shipment? A. It is two different shipments.

Q. How does that work out? A. This has been unloaded at the pier. Off the ship onto pallets on the pier, and distributed to our trucks and brought into our warehouse.

Q. I show you these documents which I have in my hand, and ask if you can identify these, in order? A. Yes, this is the coffee that came into our warehouse.

Q. What is the first document? A. It is from the Delivery Clerk at the pier. This is a release order for 500 bags off the pier.

Q. I show you another document, what is that? A. This is the Checker's report that he gave so many pallets out to the truckdriver.

Q. All right, and a third document? A. The same thing.

Mr. Manes: Mr. Gritz?

Mr. Gritz: I am a little confused, what coffee are we talking about? What is the purpose of this?

Are we talking about the coffee that Mr. Spataro was working on?

The Witness: That is right.

Mr. Gritz: He was unloading the truck?

The Witness: He was going to unload the truck.

Mr. Gritz: Am I correct that you just said this is the coffee that he was going to unload?

The Witness: That is right.

Mr. Gritz: From this trailer, is that right, sir?

The Witness: Yes.

Mr. Gritz: From the container, sir?

The Witness: That is right, from the trailer. You want to call it a container?

Mr. Gritz: It is a container on the trailer, isn't it, sir?

The Witness: No, a container is a box put on—

Mr. Manes: Wait.

Judge Bernstein: I think we stipulated as to what we thought.

Mr. Gritz: That is right, and now I am getting confused.

The Witness: Now, can I explain, Your Honor?

Mr. Gritz: No.

I just want to clarify this. I am sorry, Your Honor.

Judge Bernstein: I think we are getting into a question of semantics here.

If you want to ask him some other questions, please do.

Mr. Gritz: I just want, in my own mind, sir.

This is the coffee, the tally sheet, the Delivery Clerk, this is the coffee that Mr. Spataro was working on when he got hurt?

The Witness: He was going to work on it.

Mr. Gritz: Right, and did I ask you how would you know that, sir?

The Witness: I don't understand you, sir.

Mr. Gritz: How would you know that, sir?

The Witness: That he was going to work on it?

Mr. Gritz: No, how would you know this is the particular coffee, because a lot of coffee comes into that pier?

The Witness: On that day our tally checks with that tally. We make up tallies. Any coffee coming into our warehouse has to have an inbound tally. We make our tallies to correspond with that ship, and that 500 bags to come in.

Mr. Gritz: I understand what you are saying. But the only thing I am saying is maybe 20 containers, 20 trailers come in there, how would you know that this is the particular batch that Mr. Spataro was about to work on?

The Witness: Because I checked it from that tally onto our books, 500 bags from Monica.

Mr. Gritz: As soon as he got hurt, you went down and checked this tally?

The Witness: As soon as he got hurt I went down to take care of your client right there. I didn't check the tally. The tally is already issued to the checker. Before he backs the truck in, the check is—

Mr. Gritz: You got ahold of these papers?

The Witness: Right, the checker had the papers.

Mr. Gritz: I am sorry, I just wanted, in my own mind.

Judge Bernstein: Do you have any objection to the admission of these documents?

Mr. Gritz: I don't know who made these documents.

Yes, I object to that. This man is testifying as to what they are.

Judge Bernstein: Are you offering them at this time, Mr. Manes?

Mr. Manes: Yes, I am, Your Honor.

Judge Bernstein: Let us mark them as Respondent's Exhibits 2, 3, 4 and 5 for identification, please.

(The documents referred to, Delivery Order 9253, marked for identification as Respondent's Exhibit No. 2; Terminal Operators Tally of Merchandise Delivered, marked for identification as Respondent's Exhibit No. 3; Terminal Operators Talley of Merchandise Delivered, marked for identification as Re-

spondent's Exhibit No. 4; and Terminal Operators Talley of Merchandise Delivered, marked for identification as Respondent's Exhibit No. 5.)

Judge Bernstein: Off the record.

(Discussion off the record.)

Judge Bernstein: On the record.

Mr. Manes: Your Honor, stipulation number one, I believe which we offered, was that this cargo was inside a container.

It is our position, insofar as that stipulation is concerned, that this was not containerized cargo, as is generally understood. But that the cargo had been offloaded from a vessel, palletized at Pier 20, and then had been loaded while palletized in the body of a trailer truck, as opposed to a container, and had then been transferred to 611 Smith Street, Marra Brothers, Terminal, and was being unloaded at the time of the accident.

Judge Bernstein: Thank you, Mr. Manes.

You may continue questioning.

Do you have some exhibits there?

Mr. Manes: Yes, I do.

Judge Bernstein: They have now been marked, and do you wish to offer them in evidence?

Mr. Manes: Yes, Your Honor, I offer Respondent's Exhibit 2, a delivery order dated June 5, 1973.

Judge Bernstein: Any objection to this, Mr. Gritz?

Mr. Gritz: I don't know what it is, Your Honor. You have to forgive me.

Judge Bernstein: Off the record.

(Discussion off the record.)

Judge Bernstein: On the record.

Do you have an objection to this?

Mr. Gritz: Yes, it is impossible. How can you possibly say this is the same coffee that this man worked on, when we have testimony that there are thousands of bags that come in and out of the pier?

Judge Bernstein: The exhibit is admitted, subject to connection.

(The document referred to, Delivery Order 9253, heretofore marked for identification as Respondent's Exhibit No. 2, was received in evidence.)

Judge Bernstein: The next exhibit?

Mr. Manes: The next exhibit, Your Honor, Respondent's Exhibit 3, is a tally of merchandise delivered.

Judge Bernstein: Any objection to this?

Mr. Gritz: Number one, we don't have the maker of the records.

Number two, there is no connection that these are the same coffee bags that Mr. Spataro was working on.

Judge Bernstein: Number one, what is your answer to that?

Mr. Manes: We have a man who can testify that these are the records kept in the ordinary course of business, and so they are admissible under the rules of Federal-civil procedure or the New York civil practice rules.

Mr. Gritz: We don't overcome the relevancy. We have to prove that these are the same coffee bags.

Judge Bernstein: I am going to admit them, and if they turn out to be not relevant, I will consider them accordingly.

However, if you want a witness to show that these are records ordinarily kept in the ordinary course of

business, then I will not admit them until such a witness testifies.

Mr. Gritz: I think I will save the Court's time and concede that these are kept in the normal course of business.

Judge Bernstein: If it turns out that these are not relevant, or did not prove his case, then I will consider them accordingly.

(The document referred to, Terminal Operators Talley of Merchandise Delivered, heretofore marked for identification as Respondent's Exhibit No. 3, was received in evidence.)

Mr. Manes: The same, Your Honor, for Respondent's Exhibits 4 and 5, a talley of merchandise delivered.

Judge Bernstein: I think if your objections are the same, that I think my ruling will be the same.

(The documents referred to, Terminal Operators Tally of Merchandise Delivered, heretofore marked for identification as Respondent's Exhibit No. 4; and Terminal Operators Tally of Merchandise Delivered, heretofore marked for identification as Respondent's Exhibit No. 4, were received in evidence.)

Mr. Gritz: I would just ask one thing, if I might, Your Honor.

I see there was a clip on this. Was this a part of a packet of papers?

Judge Bernstein: I saw counsel detach them.

Mr. Gritz: Are they part of a packet? Is there something else that these four papers go to?

Mr. Manes: These are the only four papers.

Judge Bernstein: They are admitted, and I will weigh them accordingly.

John M. Farley—Direct.

By Mr. Manes:

Q. Mr. Farley, I ask you to look at Respondent's 2, and you have identified that as a delivery order. Now, what does that delivery order tell us? A. This is the truckdriver's delivery order to bring to the pier, it is being released. This is the only way that he can get the coffee.

Q. Does the delivery order have any information on it which would indicate the nature of the merchandise to be delivered, and whatever its origin or offloading was? A. Well, it has to go by these here marks.

Q. You say these here marks, please identify them. A. MPC-120, San Bruno Altura.

Q. What does that mean? A. That is country of origin where the coffee is marked. These are the bags.

Q. What is your place of delivery? A. Monica.

Q. When was it delivered to the pier? A. Delivery Clerk —it says June the 5th, it is made out. This is the date it came in, you can pick it up any day from June 5 on.

Q. Now, there is a date here, arrived cargo, what does that mean? A. 5-25.

Mr. Gritz: I am going to object to the entire line of questioning, unless it is established that this is the cargo that Mr. Spataro was working on.

Judge Bernstein: Objection overruled.

By Mr. Manes:

Q. Arrived cargo, what is that? A. 5-25.

Q. What does that mean? A. I don't know, on the pier, this is the pier papers. I am not very familiar with it.

Q. But this tells who to do what? A. That is the truckdriver's delivery receipt to give to the pier superintendent, and he can pick the coffee up. Without this he can't pick the coffee up.

Q. Look at Respondent's Exhibit 3, please, what is that document? A. It is a checker's report.

Q. What is the significance of that? A. This is to tell him what marks he is getting, how many bags he has got.

Q. What are the marks on those? A. I can't very well read them.

Q. Is there any indication from what ship the merchandise came? A. I can't make it out, either. This one I can make out.

Mr. Manes: Your Honor, admittedly the photostat isn't quite clear.

Judge Bernstein: May I see that?

Mr. Manes: Yes, but it would appear that—I will have to let you try.

Judge Bernstein: I am not going to strain my eyes if the photocopy is not legible.

If that is the best copy you could obtain, so be it.

Mr. Manes: All right.

By Mr. Manes:

Q. Now, Mr. Farley, look at Respondent's Exhibit 4. What does that indicate? A. This is the same checker's report. How many pallets he gave him, and the head marks are on it, also.

Q. What are head marks? A. The coffee marks, MPC-120, the same as you have here.

Q. Is that the same mark that is on Respondent's Exhibit 2? A. Yes.

Q. Does it indicate the nature of the vessel, the name of the vessel? A. That is right.

Q. What is the name of the vessel? A. Monica.

Q. Is that the same vessel as in Respondent's Exhibit 2? A. Yes.

Q. Now, what would that indicate then, Mr. Farley? A. That they received two pallets off this pier, and the marks are the same.

Q. What is the date of that pallet? A. 6-28.

Q. 6-28? A. Yes.

Q. That is the date of the accident? A. Yes, sir.

Q. Is it reasonable to conclude, therefore, that the coffee which was discharged from the Monica is the same coffee that was picked up by Intermodal on June 28th? A. That is right.

Mr. Manes: I have no other questions then of the witness, Your Honor.

Judge Bernstein: Okay, Mr. Gritz?

Cross Examination by Mr. Gritz:

Q. Mr. Farley, you get a paycheck every week, like everybody else does, is that right? A. Yes.

Q. Who pays you, Mr. Farley, and what does that check say? A. Pittston Warehouse.

Q. Does it say Pittston Warehouse, or Pittston Stevedoring, sir? A. Pittston Warehouse.

Q. Do you get paid by Pittston Stevedoring? A. Pittston Warehouse.

Q. Not Pittston Stevedoring?

Mr. Manes: I object to that, that is three times.

Judge Bernstein: Yes, sustained.

By Mr. Gritz:

Q. You say that you saw this accident, Mr. Farley, from your office? A. That is right.

Q. Where is your office? A. 611 Smith Street.

Q. I know it is 611 Smith Street, but here is a diagram

that we tried to draw, where is it? Where is your office? A. Is this the loading platform over here?

Q. Yes, sir. A. My office would be right over here.

Q. No, this is the water out here. A. No, you have a loading platform over here.

Q. Where is your office, sir? A. If this is the water over here, then my office would be directly—the platform would be facing this way.

Q. Could you give us an X where your office is, sir? A. My office would be right here. The platform goes this here way, and your trucks back in this here way, and I am on the second floor.

Q. You are on the second floor, sir? A. The second floor.

Judge Bernstein: Is your office in the warehouse?

The Witness: No, outside. It is a building by itself.

The warehouse is over here, and a warehouse over here. There is a warehouse all the way in back.

Judge Bernstein: You are a building alongside the string piece?

The Witness: That is J Building, that is right. Here is your platform, right next to it, and your trucks back in this way. My office is facing directly this way, and the trucks back in.

Judge Bernstein: The witness has drawn a building which I am going to mark with the letter O for office.

The Witness: Right.

Judge Bernstein: And that building is—

The Witness: That would be part of E Building. E Building is attached to the office building. E Building is facing right where I am.

Judge Bernstein: That building is to the side of the loading platform?

The Witness: Opposite.

Judge Bernstein: Where the Claimant was injured?

The Witness: Right.

Judge Bernstein: Between that is an area where trucks back in, is that correct?

The Witness: Yes.

Judge Bernstein: You have indicated on the sketch four parallel lines where three trucks can back right in?

The Witness: Right.

Judge Bernstein: Fine.

By Mr. Gritz:

Q. You are on the second floor, sir? A. Yes, sir

Q. You say that your desk faces where, sir? A. My desk faces this here, but the window is right by me.

Q. I am sorry, forgive me. Your desk faces how, sir? A. As you walk in the office, my desk faces this way. The window is right where Your Honor is.

Q. Your window is from where His Honor is sitting, sir? A. From where I am sitting, my window is right here. Just where I am sitting right here now.

Q. The window is off to your right, sir? A. Yes.

Q. That is how you came to see the accident, sir? A. I seen him fall between the truck.

Q. This report that you made, sir, did you get the statement from Mr. Spataro, or did you get it from Mr. Langella, sir? A. No, the statement I gave is what I seen.

Q. Isn't it a fact, sir, that Mr. Langella, who is down on the report there, he told you what happened, sir? A. No, I didn't.

Q. Did you ever speak to Mr. Langella? A. He is the foreman.

Q. You never spoke to him about this accident? A. No, sir.

Mr. Manes: May I ask why we are spending so much time on an accident when it was conceded?

Judge Bernstein: Why is that, Mr. Gritz?

Mr. Gritz: I am just questioning the witness in general. I didn't mean to take the Court's time.

Judge Bernstein: I would like to see us move along.

By Mr. Gritz:

Q. I just want to ask you then basically one question. This cargo that comes in, whether you put it aboard a trailer, or whether you put it aboard a container, or whatever you wish to call it, isn't it when you say prepalletized, it comes prepalletized from the ship, isn't that right, sir? A. It is palletized in the hold of the ship.

Q. When it is loaded it is prepalletized, loaded aboard the ship, sir? A. Right.

Q. When it is taken out of the ship, it is already on a pallet, and goes on a trailer or container? A. It is put on the pier.

Q. But it is already prepalletized? A. Right.

Q. When it comes off that ship, sir? A. Right.

Q. You don't stop and prepalletize it? You don't take the coffee bags and put it on a pallet, sir, do you?

Judge Bernstein: It remains on the pallet throughout?

The Witness: When it comes into Pittston Warehouse.

Mr. Gritz: When it comes off the ship?

Judge Bernstein: Do you have an objection?

Mr. Manes: I have an objection, because he asked three questions in a row, and we didn't get an answer—

Mr. Gritz: I didn't mean to.

John M. Farley—Cross.

By Mr. Gritz:

Q. When it comes into the warehouse, actually when it is unloaded from the vessel, it is already prepalletized, isn't that a fact, sir? A. Palletized.

Q. You never take it off that pallet? A. Only if it is going to another warehouse. From the Pittston pier to a Pittston Warehouse. If it is going to another warehouse it would have to be put on the floor of the truck.

Q. Do loaders come into Marra Brothers Terminal—it is called Marra Brothers Terminal, because Marra Brothers used to operate there at one time. Do lighters come into Marra Brothers Terminal where Mr. Spataro works? A. Do they come in?

Judge Bernstein: Do they come into that terminal?

The Witness: They used to come in.

By Mr. Gritz:

Q. Did they come in in 1973, in August? Do they come in there? A. Very seldom.

Q. That is not what I asked you, sir. I asked you a very simple question.

Did lighters come in there? A. A lighter.

Q. No, did they, yes or no, sir? A. Yes.

Q. Okay, fine. I didn't ask you how often they came, sir.

Judge Bernstein: Okay, please continue.

By Mr. Gritz:

Q. Now, the cargo that would come in, and I am going to call it the Marra Brothers Terminal, do you rent the property now, sir, would you know that? A. We are not there any more.

Q. I meant in 1973 when Mr. Spataro had the accident, you rented the entire terminal, is that right, sir? A. Yes, sir.

Q. The cargo that comes in there, sir, I am going to ask you three questions, and make it brief.

The cargo that comes in there, this is cargo that comes off a ship in various piers, is that right, sir? A. Right.

Q. You take it either by truck or container, whatever it may be, and you bring it to the Marra Brothers Terminal, correct, sir? A. Yes.

Q. Where it is then loaded aboard another truck or another—or a lighter, to be taken out of the pier, right, sir, to its final destination?

Judge Bernstein: Is that correct?

The Witness: Yes, that is correct.

Judge Bernstein: Please say yes or no. Don't nod your head. The reporter can't pick up the nod of your head.

By Mr. Gritz:

Q. Is it not your objective to get that cargo that comes from the ship, that goes to the terminal, out to its final destination as fast as possible, isn't that the ultimate aim, sir? A. That is our service aim.

Mr. Gritz: Thank you, I have no further questions.

Judge Bernstein: Mr. Manes, any further questions?

Redirect Examination by Mr. Manes:

Q. Is there an occasion, Mr. Farley, when that service aim isn't realized? A. I don't understand.

Q. Well, you aim to get the cargo out as quickly as possible? A. True.

Q. But as a matter of fact, isn't it true that cargo may stay in the warehouse for a considerable period of time? A. That is right.

Q. How long? A. A year.

Mr. Manes: I have no other questions.

Judge Bernstein: Do you have any other witnesses?

Mr. Manes: No other witnesses.

Judge Bernstein: Any other evidence?

Mr. Manes: No other evidence.

Judge Bernstein: Mr. Gritz, any other witnesses?

Mr. Gritz: No.

Judge Bernstein: If there is nothing further, the only matter remaining is that of post hearing submissions, which includes briefs by both parties, and a submission by Claimant's counsel in support of an application for counsel fees, which would include a breakdown of the time you have devoted to your client's claim, and what you consider to be a reasonable value of your services on an hourly basis, and on a total basis.

I would like these submitted by February 1st, if that is agreeable by both counsel.

Mr. Manes: No problem.

Mr. Gritz: No problem.

Judge Bernstein: If there is nothing further, the hearing is adjourned, and it will be formally closed in accordance with applicable procedures.

(Whereupon, at 10:50 o'clock, a.m., the hearing in the above-entitled matter was concluded.)

(59313)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PITTSTON STEVEDORING CORPORATION and HOME INSURANCE COMPANY,

Petitioners,

against

FRANK SPATARO,

Respondent,

and

DIRECTOR, OFFICE OF WORKMEN'S COMPENSATION PROGRAMS
UNITED STATES DEPARTMENT OF LABOR,

Respondent.

ON APPEAL FROM AN ORDER OF THE BENEFITS REVIEW BOARD U.S.D,L.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Rose Rinella, being duly sworn, deposes and says that she is over the age of 18 years, is not a party to the action, and resides at 951 E. 17th Street, Brooklyn, New York, 11230
That on January 28, 1976, she served 1 copies of Appendix and 2 copies of Brief for Petitioners
on

PAUL A. GRITZ, ESQ.,
Attorney for Respondent,
185 Montague Street
Brooklyn, New York 11201

Miss LAURIE M. STREETER,
Associate Solicitor
U. S. Department of Labor
Room N-2716
3rd and Constitution Ave., N.W.
Washington, D. C. 20210

by depositing the same, properly enclosed in a securely-sealed, post-paid wrapper, in a Branch Post Office regularly maintained by the United States Government at 350 Canal Street, Borough of Manhattan, City of New York, addressed as above shown.

.....

Sworn to before me this
28th day of January, 1976

JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30-0932350
Qualified in Nassau County
Commission Expires March 30, 1977